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Ex Parte

May 12, 2003

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: **WC Docket No. 02-112, Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements; CC Docket No. 96-149, Petition of Verizon for Forbearance from the Prohibition of Sharing Operating, Installation, and Maintenance Functions Under Section 53.203(a)(2) of the Commission's Rules**

Dear Ms. Dortch:

Verizon hereby files, pursuant to a request for confidential treatment, the historic data underlying its study of the costs of complying with the Commission's section 272 separate affiliate rules and, in particular, the prohibition on sharing operating, installation, and maintenance ("OI&M") functions between a Bell Operating Company ("BOC") and a section 272 affiliate. As demonstrated in Verizon's petition and prior comments, any regulatory benefit that might have been attributed to the OI&M restrictions already may be achieved as a result of other regulatory obligations. Therefore, any costs of compliance outweigh the benefits. Here, where the costs are substantial, the balance is even more clear. Thus, the more detailed estimates provided herein provide supplemental proof of the disproportionate balance.

The information for which confidential treatment is requested has been marked as "proprietary." The data show the actual expenses incurred by Verizon's section 272 affiliate and the percentages of those expenses that were incurred solely to comply with the section 272 restrictions. This follows the methodology that Verizon described in its September 24, 2002 Reply Comments in Docket 96-149. The budget data that Verizon

previously used to estimate these costs have been updated to include year 2002 actuals and other minor corrections to the historic data. The updated information show that Verizon has incurred approximately \$320 million in expenses to comply with the section 272 separate affiliate requirements from 1998 through 2002 (compared to the \$314 million estimate in the previous study) and, in particular, that it has spent \$212 million (previously, \$197 million) to comply with the OI&M restriction.

Sincerely



Joseph DiBella

Attachments

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Affiliate and Related Requirements; CC Docket No. 96-149, Petition
of Verizon for Forbearance from the Prohibition of Sharing
Operating, Installation, and Maintenance Functions Under Section
53.203(a)(2) of the Commission's Rules**

Dear Ms. Dortch:

Pursuant to the Commission's rules related to the Freedom of Information Act, 47 C.F.R. §§ 0.457 and 0.459, the Verizon Telephone Companies ("Verizon") hereby submits this request for confidential treatment of the attached data, which provides the historic expense data that Verizon used to calculate the burdens of complying with the section 272 separate affiliate rules and, in particular, the prohibition on sharing operating, installation, and maintenance functions between a Bell Operating Company ("BOC") and a section 272 affiliate. The information for which protection is requested has been marked as "proprietary." Verizon requests that these data be withheld from public release.

The attached document for which confidential treatment is being requested contains commercially sensitive information relating to the amounts spent by Verizon's section 272 affiliate to provide interLATA communications services. These data constitute "trade secrets and commercial or financial information" that are "confidential" and exempt from disclosure under the Exemption 4 of the Freedom of Information Act

("FOIA"), 5 U.S.C. § 552(b)(4). Verizon submits the following information as required by section 0.459(b) of the Commission's rules in support of its request.

(1) Identification of the specific information for which confidential treatment is sought.

The information is contained in the attached spreadsheet and is marked as "proprietary." The spreadsheet includes itemized expense data of Verizon's section 272 affiliate for the years 1998 through 2002.

(2) Identification of the Commission proceeding in which the information was submitted or a description of the circumstance giving rise to the submission.

This information is being submitted this date in an *ex parte* filing by Verizon in WC Docket No. 02-112 and CC Docket No. 96-149.

(3) Explanation of the degree to which the information is commercial or financial, or contains a trade secret or is privileged.

The information for which Verizon seeks confidential treatment consists of data concerning the amounts spent by Verizon's section 272 affiliate to provide facilities-based long distance network services. This is commercially sensitive information that telecommunications carriers normally keep confidential. Verizon keeps these data confidential and does not voluntarily disclose the information outside the company unless compelled by law or subject to nondisclosure agreements.

(4) Explanation of the degree to which the information concerns a service that is subject to competition.

The information concerns Verizon's costs to provide competitive long distance services. The long distance market is highly competitive and is served by numerous carriers, including large incumbent facilities-based carriers such as AT&T, WorldCom, and Sprint. Verizon faces competition from these carriers as well as from other carriers such as cable companies and wireless carriers, who provide long distance services together with their own local services.

(5) Explanation of how disclosure of the information could result in substantial competitive harm.

Disclosure of these data would subject Verizon to substantial competitive harm. The data show how much Verizon spent to develop its long distance network facilities, services, and related systems and where it devoted its resources to develop and grow the business. This information would aid competitors in developing their own business strategies to compete with Verizon. Disclosure of Verizon's cost data would put Verizon

at a disadvantage because it lacks similar information about its competitors. The fact that Verizon's competitors treat this information as highly confidential demonstrates the competitive harm that Verizon would suffer if this information were made public.

(6) Identification of any measures taken by the submitting party to prevent unauthorized disclosure, and

(7) Identification of whether the information is available to the public and the extent of any previous disclosure of the information to third parties.

This information is kept confidential within Verizon and is not ordinarily disclosed to persons outside the company. This information is restricted within the company to persons with a need to know. Company practices instruct employees not to disclose this information unless required to do so by competent authority. When such information is disclosed in regulatory proceedings voluntarily or by order of the commission, it is accompanied by requests for confidential treatment.

(8) Justification of the period during which the submitting party asserts that material should not be available for public disclosure.

The material must be kept confidential for an indefinite period. Confidential treatment must be accorded for as long as the information would provide a basis for competitors to assess the financial condition and Verizon's future plans for developing long distance services. Verizon cannot determine at this time any date by which the information would become "stale" for these purposes.

(9) Any other information that the party seeking confidential treatment believes may be useful in assessing whether its request for confidentiality should be granted.

Under applicable Commission and court rulings, this material should be kept confidential and should not be disclosed to the public. Exemption 4 of the Freedom of Information Act shields information from public disclosure that is (1) commercial or financial in nature; (2) obtained from a person outside the government; and (3) privileged or confidential. *See Washington Post Co. v. U.S. Department of Health and Human Services*, 690 F.2d 252 (D.C. Cir. 1982). The attached information clearly meets the first two elements of that test. With respect to the third element of the above test, the Court found in *National Parks and Conservation Ass'n v. Morton*, 498 F. 2d 765, 770 (D.C. Cir. 1974) that information is considered "confidential" if disclosure is likely to (1) impair the government's ability to obtain necessary information in the future, or (2) disclosure is likely to harm substantially the competitive position of the person from whom the information was obtained.

The Commission has recognized that competitive harm can result from the disclosure of confidential business information that gives competitors insight into a

company's costs, pricing plans, market strategies, and customer identities. *See, e.g., Pan American Satellite Corp.*, 4 FCC Rcd 4586 (1989).

Protective Order Requested

If the Commission does not exempt these data from disclosure, it should permit disclosure of the confidential information to persons, other than a Commission employee working directly on the matter, only if those persons sign the Commission's standard protective agreement. In addition, please provide me sufficient advance notice prior to any public disclosure to allow Verizon to pursue appropriate remedies to preserve the confidentiality of the information.

Sincerely



Joseph DiBella

Attachments

**ATTACHMENT
SUBMITTED SUBJECT TO
CONFIDENTIALITY REQUEST**

Dee May
Assistant Vice President
Federal Regulatory



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May 15, 2003

Ex Parte

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Petition of Verizon for Forbearance from the Prohibition of Sharing Operating, Installation, and Maintenance Functions Under Section 53.203(a)(2) of the Commission's Rules, CC Docket No. 96-149

Dear Ms. Dortch:

Verizon hereby submits a supplemental legal analysis concerning the Commission's obligation to address Verizon's petition for forbearance separate from the pending rulemaking proceeding concerning sunset of the section 272 separate affiliate requirements. Please call me if you have any questions.

Sincerely,

A handwritten signature in cursive script that reads "Dee May".

Attachment

cc: W. Maher
M. Carey
B. Olson
B. Dever
R. Tanner
C. Matthey
J. Jackson

**Verizon Petition for Forbearance from Applying
Section 53.203(a)(2) of the Commission's Rules,
CC Docket No. 96-149**

**Verizon's OI&M Forbearance Petition Must Be Considered
Promptly and Independently of Any Other Proceeding**

Verizon's petition for forbearance from applying the rule that bars Bell operating companies from sharing operating, installation, and maintenance services with their 272 affiliates (the "OI&M" rule) can and should be addressed independently of any other Commission proceeding.

First, neither the pending 272 *Sunset Rulemaking*¹ nor any other proceeding can substitute for the forbearance procedure or remedy provided under the Act. Congress required the Commission to resolve section 10 forbearance petitions and to do so within a defined timeframe. The Commission itself has recognized, as it must, that it is obligated to consider petitions for forbearance on the merits, even if it might prefer to address the substance of such requests through other types of proceedings. This is so whether a petition seeks forbearance from the general application of a regulatory obligation or its application to a particular carrier.

Second, the issue of forbearance relief is distinct from the subjects of both the 272 *Sunset Rulemaking* and the inquiry the Commission intends to launch concerning the regulatory classification of BOC long distance services provided "outside" a 272 separate affiliate.²

Forbearance would lift the requirements of the OI&M rule for the period *before* the sunset of the

¹ See Notice of Proposed Rulemaking, *Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, 17 FCC Rcd 9916 (2002).

² See Memorandum Opinion and Order, *Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, 17 FCC Rcd 26869, 26869-70 ¶ 1 (2002) ("272 *Sunset MO&O*") ("we plan to issue a Notice of Proposed Rulemaking in the coming months to seek comment on whether there is a continued need for dominant carrier regulation of BOC in-region, interLATA, domestic, interexchange telecommunications services provided outside of a section [272] separate affiliate").

current section 272 requirements; the *272 Sunset Rulemaking* and the anticipated regulatory classification inquiry concern the nondiscrimination safeguards and regulatory classification to apply *after* sunset. Analysis of the safeguards and classification that should apply to a BOC's integrated provision of interLATA services *after* sunset, when section 272 separation no longer will be required, is logically separate from the question of what the rules should be while section 272 requirements still apply.

Third, forbearance from applying the OI&M rules would not disturb the Commission's classification of Verizon's 272 affiliate as nondominant. While the Commission's earlier finding of nondominance relied on the existence of 272 rules in place at that time, including the OI&M rule, a decision to forbear will reflect the (correct) conclusion that the OI&M rule no longer is necessary. Conversely, none of the remaining 272 requirements is at issue in Verizon's petition and accordingly would remain in place.

Fourth, forbearance from the OI&M rule is warranted here under any possible construction of section 10's terms. The rule is not "necessary," whether the Commission accepts the standard definition ("essential" or "required") of that term urged by Verizon and other ILECs or it applies the expansive definition ("useful" or "appropriate") previously asserted by the Commission. The rule no longer is necessary or in the public interest. This is *precisely* the circumstance in which Congress expected and mandated that the Commission act quickly to eliminate a rule through the vehicle of forbearance.

Fifth, as Verizon explained in detail in its April 17, 2003 *ex parte*, section 10(d) does not prevent the Commission from exercising its forbearance authority with respect to the OI&M rule. As an initial matter, Verizon is not asking the Commission to forbear from applying any statutory requirement; to the contrary, its petition seeks forbearance only from one aspect of the Commission's rules that the Commission itself has recognized was *not* required by the statute. Moreover, even if that were not the case, section 10(d) would constrain forbearance from a

requirement imposed by section 272 only if section 10(d)'s reference to section 271 were interpreted to incorporate, via section 271(d)(3)(B), a prohibition on forbearance from section 272's provisions. That interpretation is not sustainable. But even if it were, section 10(d) applied to section 271 only until the latter section was "fully implemented," as it was when the Commission granted the last of Verizon's section 271 applications.

Discussion

1. Under the express provisions of section 10 of the Act, the Commission must consider Verizon's forbearance petition and do so in a timely manner. That statutory obligation cannot be avoided or even relaxed on the ground that related questions are presented or may in the future be posed in the *272 Sunset Rulemaking*, or that there might be other types of proceedings in which the Commission could grant similar relief. The section 10 mandate to forbear from applying regulations exists and operates independently from the Commission's general authority to grant waivers, or its authority to make or eliminate rules. Section 10(a) expressly provides that the Commission "*shall* forbear from applying any regulation or any provision of this Act" if the conditions for forbearance are satisfied. *See* 47 U.S.C. § 160(a) (emphasis added). And it must do so within the deadline established by the statute. *See id.* § 160(c). Thus, upon the filing of a petition for forbearance, section 10(a) *requires* the Commission to determine within 12 months whether continued application of the challenged rule is necessary, notwithstanding any other pending proceedings.

A carrier seeking forbearance from a particular rule only for itself need not style its request as one for a waiver, nor may its request be treated as one. The authority and obligation of the Commission to forbear is distinct from Commission power to grant a waiver, and the requirements for obtaining the two types of relief are likewise distinct. While an applicant for a waiver must demonstrate the existence of "special circumstances [that] warrant deviation from the general rule," *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990), a

petition for forbearance under section 10 is required to make only the showing specified in that provision of the Act. Section 10 makes clear on its face that a carrier may seek forbearance either just for itself (*i.e.*, for “a [particular] telecommunications carrier or telecommunications service”) *or* for “a class of telecommunications carriers or telecommunications services, in any or some of [the petitioner’s] or [the carriers’] geographic markets.” *See* 47 U.S.C. § 160(a). And in *either* case, the carrier seeking forbearance will be entitled to such relief as long as it meets the specific test set out in section 10. There accordingly is no requirement that a forbearance petition satisfy the waiver standard; nor is there any requirement that a carrier seeking forbearance due to its particular circumstances do so via the waiver process.

By the same token, carriers seeking relief of a *generalized* nature need not do so in the context of a rulemaking. Again, section 10 expressly provides that petitioners may seek relief for an entire class of carriers via the forbearance route as long as the section 10 test is satisfied. While a party *may* ask the Commission to consider such industry-wide relief in general rulemaking proceedings, section 10 also is available as a unique route for parties to move the Commission to streamline and rationalize the regulation of the telecommunications industry as a whole.

Nor does the existence of another potential alternative source of relief relieve the Commission of its duty to fulfill, within the time allotted, its statutorily mandated responsibility under section 10. Section 10(a) does not merely authorize the Commission to forbear; that section provides that the Commission “shall forbear” if it determines that specific criteria are satisfied. Even if the Commission plans to consider a particular issue in the future, has the issue under consideration in a pending rulemaking, or even has adopted rules concerning that issue, section 10 directs the Commission to take up a forbearance petition on the issue and resolve the petition within 12 months. Thus, neither the Commission’s plan to issue a notice on whether BOC integrated long distance operations should be treated as nondominant following 272 sunset,

nor the existence of the 272 *Sunset Rulemaking*, relieves the Commission of its obligation to consider Verizon's forbearance petition.

The Commission itself has acknowledged that section 10 stands independently from other statutory bases for relief from regulation. In its brief in the *CTIA Wireless LNP* case, the Commission also recognized that, on receiving a petition for forbearance, it is "*oblige[d]* . . . to evaluate the rule or statute pursuant to the criteria set out in section 10 and to determine *on the basis of the record and its evaluation* whether forbearance is required."³

The Commission's acknowledgement of its duties under section 10 accords with the D.C. Circuit's explicit guidance on this point. That court emphasized in *AT&T v. FCC*, 236 F.3d 729, 737-38 (D.C. Cir. 2001), that the Commission may not refrain from exercising its responsibility to resolve petitions under section 10 merely because the petitioner has an alternative source of relief. Rather, because "Congress has established § 10 as a *viable and independent* means of seeking forbearance," reference to "another, very different, regulatory mechanism," such as the notice and comment rulemaking procedure, provides "no authority" for the Commission to fail to exercise its statutory responsibilities under section 10. *Id.* (emphasis added). Just as the Commission was unable to consider that the petitioners in *AT&T v. FCC* could "receive *much* [not all] of the relief they seek" under the Commission's Pricing Flexibility Order, *id.* (emphasis in original) (internal quotation omitted), so here the Commission may not avoid addressing

³ Brief for Respondents at 29, *Cellular Telecommunications & Internet Ass'n v. FCC*, No. 02-1264 (D.C. Cir. filed Feb. 3, 2003) (emphasis added); *see also* Memorandum Opinion and Order, *Petition of U S WEST Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance*, 14 FCC Red 16252, 16269 ¶ 29 (1999) ("*NDA Order*") ("Section 10 states, however, that we *must* forbear from enforcing section 272 if we find that: (1) such requirements are not necessary to ensure that the charges, practices, classifications, and regulations with respect to the service or activity at issue are just and reasonable, and not unjustly or unreasonably nondiscriminatory; (2) such requirements are not necessary to protect consumers; and (3) forbearance is consistent with the public interest.") (emphasis added).

Verizon's OI&M forbearance petition on the ground that the pending *272 Sunset Rulemaking* might provide Verizon with some of the relief it seeks through its petition. Rather, the Commission is required by the Act to resolve Verizon's petition on the merits, and to do so within the time required by statute, not in some pending or future rulemaking proceeding.

2. In addition, the issue raised by Verizon's petition is separate and distinct from other issues in pending or soon to be initiated proceedings. In the *272 Sunset Rulemaking*, the Commission is considering what, if any, protections should apply *after* sunset of the 272 requirements. Verizon's forbearance petition does not overlap with that issue. The petition concerns only whether the unnecessary and burdensome OI&M rule should be among the 272 rules that are applicable today, *before* sunset of the 272 requirements. As the petition demonstrates, the 272 rules applicable prior to sunset manifestly should *not* include the OI&M rule: it is not necessary to accomplish any valid Commission goal not otherwise accomplished by other means, but instead simply imposes costs unaccompanied by any countervailing benefit. Thus, if the OI&M rule were eliminated today, the separation between the BOCs' provision of local and in-region interLATA services would remain intact: Verizon would continue to offer its in-region interLATA services through a separate 272 affiliate, and all remaining 272 requirements would continue to apply until sunset of section 272.

Accordingly, the Commission can readily grant the relief requested in Verizon's forbearance petition without addressing the fundamentally distinct question presented by the *272 Sunset Rulemaking*, which considers what rules, if any, should apply to a BOC's provision of in-region interLATA services *after* 272 requirements have sunset.

3. Similarly, Verizon's forbearance petition does not trigger the question, which the Commission indicated in the *272 Sunset Rulemaking* that it intends to explore further, of the appropriate regulatory classification of a BOC's integrated provision of in-region interLATA services post-sunset of the 272 requirements. See *272 Sunset MO&O* at ¶ 1 & n.5. In 1997 the

Commission pointed to the 272 protections in determining that BOCs' 272 affiliates would be classified as nondominant; the elimination of the OI&M rule will not disturb that determination because the BOCs will remain subject to section 272 and the regulations that the Commission has deemed necessary to give effect to that section. As discussed in part 4 below, the Commission has recognized that it could have achieved the purposes of section 272(b)(1) *without* the OI&M rule. But even leaving that aside, a Commission decision now to forbear from the OI&M rule would establish that the rule plainly is not necessary to serve the purposes of section 272 *today*. Forbearance would thus demonstrate that the OI&M rule is not necessary to ensuring the separation of the 272 affiliate, and its elimination accordingly cannot affect the continuing nondominant status of the affiliate.⁴ This is especially the case given that the 272 affiliate will of course continue to be subject to all the remaining applicable 272 protections. Forbearance -- and continued nondominant treatment of the BOCs' 272 affiliates today -- therefore is unrelated to, and need not await resolution of, the inquiry in the 272 *Sunset Rulemaking* concerning the regulatory classification of integrated interLATA services provided when the 272 requirements sunset.

4. The OI&M rule is not "necessary" under any definition of that term. Section 10(a) directs the Commission to consider whether (a) enforcement "is not necessary to ensure that the charges, practices, classifications, or regulations [of the carrier] . . . are just and reasonable and are not unjustly or unreasonably discriminatory," (b) enforcement "is not necessary for the protection of consumers," and (c) forbearance is "consistent with the public interest." 47 U.S.C. § 160(a). Verizon believes that the standard, commonly understood meaning of "necessary"

⁴ See Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area*, 12 FCC Rcd 15756, 15834-35 ¶ 134 (1997) (granting nondominant treatment because of the existence of section 272 and implementing rules).

applies: “that which is *required* to achieve a desired goal,”⁵ or what is “essential.”⁶ The Commission has taken an alternative, more expansive view that “necessary” means only “useful” or “appropriate” because the forbearance statute “appl[ies] broadly to the agency’s functions.”⁷ But however the Commission defines “necessary,” the OI&M rule is unnecessary and forbearance from applying the rule is required under section 10.

The OI&M rule was not the only means by which the Commission could achieve its goals at the time of the rule’s adoption, and today the rule has no useful or appropriate purpose not served by other, existing regulations. In the *Non-Accounting Safeguards Order*, the Commission expressly stated that that it could have achieved the purposes of section 272(b)(1) *without* the OI&M rule, and it thus is evident that the rule was not dictated by that section. The Commission perceived the risk that allowing the same individuals to perform OI&M functions for both the BOC and its affiliate would present opportunities for improper cost allocation.⁸ The Commission also acknowledged that it could address that concern -- and thus any 272 concern about such sharing -- through auditing and monitoring of accounting plans. Nevertheless, despite the absence of a record on the costs and benefits of structural separation versus cost

⁵ See *GTE Serv. Corp. v. FCC*, 205 F.3d 416, 423 (D.C. Cir. 2000) (emphasis added) (stating that a statutory reference to “necessary” must be “construed in a fashion that is consistent with the ordinary and fair meaning of the word”) (citing *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 389-90 (1999)).

⁶ See *Merriam Webster’s Collegiate Dictionary* 776 (10th ed. 2000) (defining “necessary” as “absolutely required,” “indispensable,” or “essential”).

⁷ See Respondents’ Brief at 25, *Cellular Telecommunications & Internet Ass’n* (No. 02-1264); see also Report, *2002 Biennial Regulatory Review*, 2003 WL 1192543, ¶¶ 15, 17-18 (rel. March 14, 2003) (concluding that, as used in section 11 of the Act, “necessary” means “useful,” “convenient,” or “appropriate”).

⁸ See First Report and Order and Further Notice of Proposed Rulemaking, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, 11 FCC Rcd 21905, 21984 ¶ 163 (1996) (“*Non-Accounting Safeguards Order*”).

accounting, the Commission adopted rules requiring structural separation, including the OI&M rule, to monitor the allocation of costs between BOCs and their affiliates.

Today it is clear that the OI&M rule not only adds no value, but also that it is affirmatively counterproductive because it imposes enormous costs and inefficiencies that ultimately must be borne by consumers. Verizon and the Commission now have had broad experience with shared services, and that experience shows that accounting mechanisms are fully capable of assuring the absence of discrimination. Moreover, there is no material difference between the cost allocations necessary to monitor shared OI&M services and the cost allocations the Commission applies to administrative and other services permitted to be shared between BOCs and their affiliates.⁹ In short, the OI&M rule serves no useful or appropriate purpose; it imposes a far greater burden than anything the Commission ever believed was “necessary” under section 272 of the Act, and it imposes enormous costs that can and should be eliminated.

In addition, any risk of cross-subsidization that may have existed at the time the Commission adopted the OI&M rule does not exist today. Now, as then, BOCs are subject to price-based regulation in the federal arena and in most states. Under price caps, misallocating costs to regulated accounts does not increase the carrier’s prices or revenues. Since the Commission adopted the OI&M rule, it severed the last remaining links between prices and costs by eliminating sharing from price caps and by adopting the CALLS structure. At the same time, all market segments now are open to competitive entry, and entry has occurred on a large scale.

⁹ Moreover, section 272(b)(1) is by no means the only provision that operates to assure nondiscrimination by a BOC. Sections 272(b)(2)-(5) impose structural and transactional restrictions on Verizon’s 272 separate affiliate; section 272(c) requires Verizon to comply with specified nondiscrimination safeguards; section 272(e) imposes still other requirements on both Verizon and its affiliate; and, even after forbearance from the OI&M rule, section 272(b)(1) would require Verizon’s separate affiliate to operate independently from Verizon.

Each of these factors means that A BOC has no real incentive to misallocate costs, even in the unlikely event that such misallocations could escape detection by the Commission's controls.

In sum, the OI&M rule is not "necessary" in that it is not required, essential, useful, *or* appropriate: it simply imposes substantial costs on Verizon while achieving *no* goal that, even broadly defined, is related to any "agency function" of the Commission.

5. Finally, as Verizon previously has explained in its April 17, 2003 *ex parte* submission, the Commission's authority to forbear from applying the OI&M rule is not constrained by section 10(d). As an initial matter, section 10(d) prohibits the Commission only from forbearing from certain specified statutory provisions. But Verizon's petition does not seek forbearance from *any* statutory requirement. Indeed, the OI&M rule is not a requirement of section 272 but an additional rule adopted by the Commission. Moreover, as Verizon has shown, the limitation in section 10(d) on the Commission's authority to forbear with respect to "the requirements of section 251(c) or 271," 47 U.S.C. § 160(d), should be narrowly construed and does not extend to section 272 simply because it is referenced in section 271 of the Act.

Furthermore, Congress limited the Commission's 271 forbearance authority only "until [the Commission] determines that those requirements have been fully implemented." *Id.* While the Commission has not previously addressed the meaning of "fully implemented," section 271's requirements *must* be considered fully implemented where, as in Verizon's case, a BOC has obtained authorization to offer interLATA services pursuant to section 271 and continues to comply with the requirements of section 271 through performance assurance plans. Indeed, section 271 itself uses the same "fully implemented" language in defining the conditions under which the Commission may grant a BOC's application for long distance authority. *See* 47 U.S.C. § 271(d)(3)(A)(i). There are no additional steps that Verizon could take in order to implement section 271 further; if the Commission's own finding that Verizon satisfies all the requirements of section 271 in each of the states Verizon serves does not constitute full

implementation of that provision by Verizon, the “fully implemented” proviso would lack any content. That of course cannot be the case. Thus, that language must be read to permit forbearance here.



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May 15, 2003

Ex Parte

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Petition of Verizon for Forbearance from the Prohibition of Sharing Operating, Installation and Maintenance Functions Under Section 53.203(a)(2) of the Commissions Rules, CC Docket No. 96-149

Dear Ms. Dortch:

Yesterday, Dee May and Ed Shakin of Verizon met separately with Lisa Zaina of Commissioner Adelstein's office and Jessica Rosenworcel of Commissioner Copps's office to discuss the above proceeding. The handout used during those meetings is attached. Please let me know if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Ann D. Berkowitz".

Attachment

cc: L. Zaina
J. Rosenworcel

Operating, Maintenance & Installation (OI&M) Forbearance

Background and Overview

- The OI&M restriction is not mentioned anywhere in the Act.
- The Commission created it when it adopted rules to implement the “operate independently” provision in section 272(b)(1).
- The Commission was primarily concerned about its ability to monitor the allocation of costs between the BOCs and their 272 affiliates.
- When it was adopted, the Commission did not have a record to conduct a cost-benefit analysis of using structural separation as opposed to accounting safeguards.
- On 8/5/02, Verizon filed its petition for forbearance from the prohibition of OI&M in CC Docket 96-149.

There is Support for Forbearance

- Verizon's has several years of experience with 272 affiliates.
- The OI&M restriction is the major factor in the additional costs caused by the 272 separate affiliate rules. The prohibition:
 - Prevents Verizon from offering one-stop customer interface for repair and provisioning.
 - Imposes duplicative costs on Verizon's affiliates by requiring them to hire additional personnel to do provisioning and maintenance work that could be done more efficiently by sharing personnel with the BOC.
 - Requires the affiliate to develop and operate its own operating support systems when the BOCs' OSSs could perform the same tasks with little modification.

Verizon's Analysis Shows

- The costs of complying with the OI& M restriction far outweigh any previously perceived benefits.
- Verizon incurred approximately \$320 million in expenses to comply with the section 272 separate affiliate requirements from 1998-2002, of which \$212 million is related to the OI&M restriction.
- Verizon could not eliminate all sunk investments if the OI&M restriction were eliminated today, but it could achieve about \$183 million in incremental savings from 2003-2006 by sharing these services with the BOCs.

There is No Regulatory Need for the Restriction

- BOCs and their 272 affiliates should be allowed to share OI& M services just as they are permitted to share administrative and other services.
- There is no fundamental difference between the cost allocations necessary to monitor the sharing of OI& M and services such as finance, human resources, legal and accounting.
- Positive time reporting can be used as it is used today for nonregulated services such as inside wiring maintenance.

Concerns Raised are Unfounded

- Cross-subsidization is not a realistic danger for carriers such as the BOCs who are subject to price-based regulation.
- Elimination of sharing and adoption of CALLS, which eliminated the need for cost supported SLC and which reduces the X factor to the GDPPI when the average traffic sensitive rate hits the target (which it has in virtually all of Verizon areas) are changed circumstances which avoid the cross-subsidization concerns that the Commission cited in adopting the OI&M restriction.
- Restriction is not necessary to prevent discrimination -- the Commission retains ample authority under the Act:
 - All Section 272(e) nondiscrimination safeguards continue to apply until sunset.
 - Sections 272(e)(1) and (e)(3) ensure parity of performance and access charge imputation even after sunset.
 - Sections 201 and 202 ensure the reasonableness of access charges and prohibit discrimination.
 - Section 251(c) and the Commission's network disclosure rules provide additional safeguards.

Long Distance Market Share

- Arguments that the OI&M restriction hasn't handicapped BOCs because they have been able to gain significant shares of the long distance market in a relatively short time are beside the point.
 - They shed no light on the artificial costs imposed by the restriction.
 - BOCs' success is primarily the result of their marketing and sales efforts in addition to innovative pricing plans.
 - Moreover, the BOCs have courted the residential and low-volume customers that the IXC's were losing interest in.
 - In the large business market, the BOCs are starting with virtually no market share and incumbent IXC's still dominate.

Inefficiencies Will be Exacerbated in a Broadband Environment

- The OI&M restriction requires the use of multiple work groups to deal with arbitrarily delineated demarcations between “local” and “long distance.”
- The restriction saddles the BOCs and the 272 affiliates with separate systems for network creation, ordering, provision, surveillance, maintenance and repair.
- Elimination of this restriction would allow Verizon to compete on equal terms with other broadband providers

Impact on the Large Business Market

- The OI&M restriction puts Verizon at a significant disadvantage in competing with carriers that are able to offer an integrated service platform using their local and long distance facilities.
- Many of Verizon's competitors provide their own transmission facilities directly to the customer's location, seamlessly integrating "local" and "long distance" networks and using a single work force to respond to installation and repair requests.
- The OI&M rules result in handoffs of customer requests for service and repair that add costs and difficulty in meeting large business customer expectations.